

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

RAY LOY,

Petitioner,

v.

Civil Action No. 1:13-cv-117

EVELYN SEIFERT,

Respondent.

**ORDER ON PENDING MOTIONS AND RECOMMENDATION THAT PETITIONER'S
MOTION FOR SUMMARY JUDGMENT BE DENIED**

On March 28, 2013, Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On July 24, 2013, Respondent filed a motion to dismiss the petition as untimely. On July 26, the undersigned issued a report and recommendation ("R&R") recommending that Respondent's motion to dismiss be denied and that she be required to answer the petition within twenty-eight days. On July 30, 2013, Respondent filed a motion conceding her error in arguing that Petitioner's petition was untimely and waiving her 14-day deadline to object to the undersigned's R&R. On July 30, 2013, the Court entered an Order adopting the R&R on ordering Respondent to answer the petition within twenty-eight days. However, on August 2, 2013, Petitioner filed timely objections to the R&R. Specifically, Petitioner argued that granting Respondent twenty-eight days in which to answer the petition amounts to an extension of time to which Respondent is not authorized. Additionally, Petitioner used his objections to move for summary judgment. Because the Court had already adopted the undersigned's R&R, Petitioner's objections were construed as a timely motion to

reconsider the Court's Order adopting the R&R. On October 10, 2013, the Court entered an Order denying Petitioner's Motion to Reconsider its Order Adopting the Report and Recommendation of the undersigned. Accordingly, several other motions pending in this case are now ripe for consideration.

The first motion is Respondent's Motion to Substitute Attorney (Doc. 36) filed on August 19, 2013. That motion is **GRANTED**. Also on August 19, 2013, Respondent filed a Motion for Extension of Time to File a Response (Doc. 37) requesting an enlargement of the time within which Respondent was ordered to respond by the Order Adopting the Report and Recommendation. In that motion, Respondent requested an extension to answer the petition until October 18. Because Petitioner's Motion to Reconsider has just been disposed of by the Court, Respondent's Motion is **DENIED AS MOOT**. Respondent has ten (10) days from the date of this Order to answer the petition.

Petitioner has filed four motions still outstanding in this case. First, on August 29, 2013, Petitioner attached a Motion for Appointed Counsel (Doc. 38) to his objections to Respondent's motion for an extension of time. On May 30, 2013, the undersigned denied Petitioner's previously filed motion for appointed counsel because Petitioner failed to show a particular need or exceptional circumstances such that the assistance of counsel was necessary. The undersigned is still of the opinion that appointed counsel is not necessary in this case. Accordingly, Petitioner's Motion for Appointed Counsel is **DENIED**. Next, on September 9, 2013, Petitioner filed a Motion to Proceed (Doc. 40), requesting that this case be moved along. As discussed above, Petitioner's Motion for Reconsideration has recently been disposed of by the Court such that this case can proceed. Accordingly, Petitioner's Motion to Proceed is **DENIED AS MOOT**. Finally, Petitioner filed a

Motion for Status Update (Doc. 44) on October 7, 2013. In the motion, Petitioner requests an update on the pending matters before this Court. Because the Court's Order denying Petitioner's Motion for Reconsideration and this Order effectively answer Petitioner's inquires, Petitioner's Motion for Status Update is **DENIED AS MOOT**.

The final matter before the Court is Petitioner's Motion for Summary Judgment (Doc. 38), which he also attached to his August 29, 2013 Objections. The undersigned recommends the motion be denied as premature because Respondent has not yet answered the petition in this case.

In sum, Respondent's Motion to Substitute Attorney is **GRANTED**. Respondent's Motion for Extension of Time to File a Response is **DENIED AS MOOT**. Respondent has ten (10) days from the date of this Order to answer the petition. Petitioner's Motion for Appointed Counsel is **DENIED**. Petitioner's Motion to Proceed is **DENIED AS MOOT**. Petitioner's Motion for Status Update is **DENIED AS MOOT**. Finally, the undersigned recommends that Petitioner's Motion for Summary Judgment be **DENIED**.

Filing of objections does not stay this Order.

Any party may, within fourteen [14] days of the filing of this Order, file with the Clerk of the Court written objections identifying the portions of the Order to which objection is made, and the basis for such objection. A copy of such objections should also be submitted to District Court Judge of Record. Failure to timely file objections to the Order set forth above will result in waiver of the right to appeal from a judgment of this Court based upon such Order.

The Clerk of the Court is directed to mail a copy of this Order to the *pro se* Plaintiff, certified mail return receipt requested, and any counsel of record, as applicable.

IT IS SO ORDERED

DATED: October 21, 2013

John S. Kaul

JOHN S. KAULL

UNITED STATES MAGISTRATE JUDGE